(1)
Supreme Court, U.S.
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No. 05-9

In The

Supreme Court of the United States

VIATEUR COMMEREE,

Petitioner,

v.

OFFICE OF COMPLIANCE and OFFICE OF ARCHITECT OF THE CAPITOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress, by 2 U.S.C. 1317(a) of the Congressional Accountability Act of 1995, provided Petitioner without limitation, a property interest in a private cause of action based on unlawful retaliation taken by an employing office against any covered employee because the covered employee has opposed any practice made unlawful by this Act, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other remedy under the Act. The Board of Directors of the Office of Compliance determined in *Bajbor* v. *Office of the Architect of the Capitol*, Case No. 01-AC-377(RP) that retaliation claims based on "litigation tactics" taken by a respondent employing office were deprived of subject matter jurisdiction and reasserted and applied said ruling to the instant matter. The questions presented by this case are:

1. Whether Congress deprived Respondent Board of authority to promulgate substantive regulations limiting the subject matter jurisdiction of claims of retaliation brought under 2 U.S.C. 1317(a) of the Congressional Accountability Act of 1995?

2. Whether Congress deprived Respondent Board of authority to promulgate substantive regulations limiting the subject matter jurisdiction of retaliatory claims brought under 2 U.S.C. 1317(a) by adjudication?

QUESTIONS PRESENTED – Continued

3. Whether 2 U.S.C. 1317(a) of the Congressional Accountability Act of 1995 as determined by the Board of Directors in *Bajbor* v. *Office of the Architect of the Capitol* Case No. 01-AC-377(RP) and applied in the instant matter is facially unconstitutional and discriminatory in violation of Petitioner's First Amendment right of petition and Fifth Amendment guarantees of due process and equal protection?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Viateur Commeree was appellant in the Federal Circuit Court of Appeals. Petitioner Commeree was the complainant in the Office of Compliance and the Office of the Architect of the Capitol was the respondent in the Office of Compliance.

Respondent Office of Compliance and Respondent Office of the Architect of the Capitol were appellees in the Federal Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Hearing Officer's Memorandum Opinion and Order dismissing the Complaint in Case No. 02-AC-30 (DA, RP), *Commeree* v. *Office of the Architect of the Capitol*, is unpublished and is reproduced herein as pages 5-7 of the Appendix. The decision of the Board of Directors of the Office of Compliance, "Respondent Board," is unpublished and is reproduced herein as pages 2-4 of the Appendix.

The Order of the Federal Circuit affirming without opinion the decision of the Respondent Board is unpublished and is reproduced herein as page 1 of the Appendix. The Federal Circuit's Order denying rehearing and rehearing *en banc* is unpublished and is reproduced herein as page 8 of the Appendix.

JURISDICTION

The Federal Circuit issued its order denying rehearing and rehearing *en banc* on March 28, 2005. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The appeal involves Section 207(a), 2 U.S.C. 1317(a) of the Congressional Accountability Act of 1995, the "CAA," 2 U.S.C. 1301 *et seq*.

Section 1317(a) provides:

> PROHIBITION OF INTIMIDATION AND REPRISAL.
>
> (a) In General. – It shall be unlawful for an employing office to intimidate, take reprisal against, any covered employee because the covered employee has opposed any practice made unlawful by this Act, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other remedy under this Chapter.

Amendment I to the Constitution provides in part that

> "Congress shall make no law . . . prohibiting . . . or abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

Amendment V to the Constitution provides in part that

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(All statutory provisions referenced herein this Petition are reproduced in the Appendix, pp. 9-35.)

STATEMENT OF THE CASE

Congress, by 2 U.S.C. 1317(a), provided a covered employee with a property interest in a private right of redress and cause of action based on retaliation resulting from participation in any facet of the Congressional Accountability Act, "the CAA," including but not limited to participation in the Administrative-Judicial Dispute Resolution Procedures contained in 2 U.S.C. 1402, 2 U.S.C. 1403 and 2 U.S.C. 1404 to enforce the private right of redress and cause of action resulting from unlawful discrimination resulting from the immutable characteristics of race, color, sex, national origin, age, disability. See 2 U.S.C. 1311, App 11-13. Congress in no way limited or proscribed a covered employee's right to redress claims of unlawful discrimination and unlawful retaliation brought pursuant to 2 U.S.C. 1311 and 2 U.S.C. 1317(a). Respondent Board, in *Bajbor* v. *Office of the Architect of the Capitol*, Case No. 01-AC-377 (RP) and absent statutory authority, established retaliatory claims based on "litigation tactics" as a class and category of retaliatory claims deprived of subject matter jurisdiction under 2 U.S.C. 1317(a).

In the instant matter the Petitioner and Respondent Office of the Architect of the Capitol, "Respondent AOC" were plaintiff and defendant respectively in four cases submitted and consolidated by the United States District Court for the District of Columbia, "*Commeree I.*" (*Commeree* v. *Office of the Architect of the Capitol, et al.*, 97-CV-0242(TFH); 97-CV-01632(TFH); 97-CV-02398(TFH); and 98-CV-0185(TFH).) *Commeree I* was based on unlawful discriminatory and unlawful retaliatory conduct taken in violation of 2 U.S.C. 1311(a)(3) and 2 U.S.C. 1317(a) of the CAA. The District Court, pursuant to deliberate and intentional misrepresentations of material facts and laws

presented by Respondent AOC, granted Respondent AOC's Motion to Dismiss *Commeree I*. On appeal, the United States Court of Appeals for the District of Columbia, Case No. 00-5308, affirmed the decision of the District Court.

In the instant matter Petitioner brought an action pursuant to 2 U.S.C. 1317(a) of the CAA based on unlawful retaliation based on Petitioner's prior participation in the federal protected activities associated with his prosecution of *Commeree I*: the Administrative-Judicial Dispute Resolution Provisions contained in 2 U.S.C. 1402, 2 U.S.C. 1403 and 2 U.S.C. 1404. See App. 27-30.

Respondent Board, reasserting its decision in *Bajbor* v. *Office of the Architect of the Capitol*, Case No. 01-AC-377 (RP) and applying it to the instant matter, arbitrarily and without statutory authority to engage in and promulgate substantive regulations and policy respecting 2 U.S.C. 1317(a), as a matter of law deprived Petitioner's causes of action of subject matter jurisdiction and dismissed the Complaint. "As we held in *Bajbor*, a party must deal with its opponent's litigation actions before that very tribunal hearing the substantive claims. The doctrines of *res judicata* and *collateral estoppel* preclude a party from collaterally challenging that tribunal's judgment by bringing a new action before the Office of Compliance. The Office simply will not entertain such complaints." Id. at App. 4.

Petitioner appealed to the Federal Circuit. The Federal Circuit, without opinion affirmed the decision of Respondent Board on December 15, 2004. See App. 1.

Petitioner sought rehearing and rehearing *en banc*, both of which were denied. App. 8.

REASONS FOR GRANTING THE WRIT

I. RESPONDENT BOARD OF DIRECTORS IS DEPRIVED OF RULEMAKING AUTHORITY WITH RESPECT TO 2 U.S.C. 1317(a)

Respondent Board, in applying *Bajbor* to the instant matter, reasserted authority to engage in and promulgate substantive regulations limiting the subject matter jurisdiction of 2 U.S.C. 1317(a) and thereby limited Petitioner's First Amendment right to redress unlawful retaliation provided in 2 U.S.C. 1317(a) and 2 U.S.C. 1402, 2 U.S.C. 1403 and 2 U.S.C. 1404 of the Administrative-Judicial Dispute Resolution Procedures of the CAA and deprived Petitioner of his Fifth Amendment guarantees of due process and equal protection.

Respondent Board, by *Bajbor* and absent statutory authority and a compelling reason to limit the subject matter jurisdiction of 2 U.S.C. 1317(a), arbitrarily established a category of retaliatory claims under 2 U.S.C. 1317(a) which were deprived of subject matter jurisdiction: claims of unlawful retaliation arising from "litigation" and "litigation tactics" which commenced with the filing of a Request for Counseling pursuant to 2 U.S.C. 1402.

Respondent Board, by its application of *Bajbor* to the instant matter, unconstitutionally deprived Petitioner of his Fifth Amendment property interest in his cause of action based on retaliation pursuant to 2 U.S.C. 1317(a). See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Respondent Board, by reasserting its decision in *Bajbor* and replicating the affirmative defense of "litigation tactics" set forth therein, solidified for Respondent AOC the grant of absolute immunity for engaging in abusive "litigation tactics" and misconduct including but not limited to abusing process; suborning perjury by the preparation and submission of false and perjurious affidavits and testimony; and, as in the instant matter misrepresenting material facts and law to the Court. Said affirmative defense of "litigation tactics" provides Respondent AOC with an incentive to engage in litigation misconduct. Respondent Board, in rewarding an employing office with a grant of absolute immunity for abusing process, robs the Petitioner of a meaningful constitutional right of redress and constitutional property interest in his cause of action based on retaliation provided by 2 U.S.C. 1317(a).

The instant matter involves Respondent Board's construction of 2 U.S.C. 1317(a), a statute that it only enforces pursuant to its role in the Administrative-Judicial Dispute Resolution Procedures set forth in 2 U.S.C. 1401 – 2 U.S.C. 1416.

The framework for analyzing Respondent Board's assertion of authority to engage in the promulgation of substantive regulations and policymaking respecting 2 U.S.C. 1317(a), whether by notice and comment or by adjudication, is governed by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Under *Cheuron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." Id. at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the

unambiguously expressed intent of Congress." Id. at 843; see also *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 392 (1999); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398 (1996). But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Auer* v. *Robbins*, 519 U.S. 452, 457 (1997). Such deference is justified because "the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones," *Chevron*, supra, at 866, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated, see *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991).

In determining whether Congress has specifically addressed the question at issue, a reviewing court does not confine itself to examining a particular statutory provision in isolation. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). A court must place the provision in context, interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

An administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress. In an effort to effectuate the congressional purpose of protecting the public, the Court must take care not to extend the scope of the statute beyond the point

where Congress indicated it would stop. See *United States* v. *An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969) citing *62 Cases of Jam* v. *United States*, 340 U.S. 593, 600 (1951).

The court must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995).

The Court is also to be guided by common sense as to the likelihood that Congress did not delegate a policy decision of such political magnitude to the five unelected attorneys who are principally engaged in private practice and who make up the membership of Respondent Board: establishing an "affirmative defense" which grants an absolute immunity to an employing office and limits thereby the broad subject matter jurisdiction of the general retaliatory provision of the CAA as enacted by Congress.

That it was most unlikely that Congress, given the unique political history of the institution and the revolutionary nature of said legislation to Congress, would leave the statutory parameters and standards of the general retaliatory statute of the CAA to the unchecked discretion of the five unelected private attorneys, is supported and corroborated by the caveat and notification set forth by Congress in 2 U.S.C. 1431: substantive rules promulgated pursuant to legitimate authority are an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and either House of the Congress does not relinquish its constitutional right to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any

other rules of each House. See 2 U.S.C. 1431, 2 U.S.C. 1302(b)(3) and 2 U.S.C. 1384(c) at App. 35; 10-11; and, 22-26.

Petitioner contends, with these principles in mind, that Congress directly spoke to the instant issues and precluded Respondent Board from engaging in substantive rulemaking and policymaking limiting the subject matter jurisdiction of 2 U.S.C. 1317(a) that is reflected in the "affirmative defense" of "litigation tactics" set forth in the decisions of Respondent Board in *Bajbor* and the instant matter.

Reading the CAA as a whole reveals that Congress, by inclusion and exclusion and not by failure or inadvertence, intentionally deprived Respondent Board explicit and implicit authority to promulgate policy, standards, and regulations respecting 2 U.S.C. 1317(a), the general retaliatory statute of the CAA.

Congress, while intentionally depriving Respondent Board with authority to promulgate policy with respect to 2 U.S.C. 1317(a), explicitly delegated said authority to Respondent Board pursuant to due process notice and comment rulemaking for the Acts hereinafter enumerated and made applicable by the CAA, 2 U.S.C. 1302(a)(1)-1302(a)(11): the Family and Medical Leave Act of 1993 – 2 U.S.C. 1312(d); Fair Labor Standards Act of 1938 – 2 U.S.C. 1313(c); Employee Polygraph Protection Act of 1968 – 2 U.S.C. 1314(c); Worker Adjustment and Retraining Notification Act – 2 U.S.C. 1315(c); rights and protections relating to Veterans' Employment and Reemployment – 2 U.S.C. 1316(c); the rights and protections under Americans with Disabilities Act of 1990 relating to public services and accommodations; procedures for remedy of violations, 2

U.S.C. 1331; the Occupational, Safety and Health Act of 1970 – 2 U.S.C. 1341(c)(6)(2); and, Labor-Management Relations, 2 U.S.C. 1351. See App 13-21. "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Babbitt* v. *Sweet Home Chapter of Communities For a Great Oregon*, 515 U.S. 687 (1995) citing *Keene Corp.* v. *United States*, 508 U.S. 200 (1993).

Congress, having already enacted the broad standards Respondent Board was to employ pursuant to its enforcement role set forth in the Administrative-Judicial Dispute Resolution Procedures of the CAA, did not need to delegate to Respondent Board statutory authority to engage in substantive policymaking respecting the parameters of 2 U.S.C. 1317(a).

This is not a case of simple inaction or a failure by Congress to act. It is obvious Congress considered and rejected giving Respondent Board the necessary delegated authority. Congress intentionally precluded a meaningful role for Respondent Board in policymaking 2 U.S.C. 1317(a). Regulation was to remain in the domain of Congress. Congress reserved substantive policy to itself. Any move by Respondent Board to promulgate by adjudication or due process notice and comment rulemaking would be inconsistent with the clear congressional intent of the particular statute in context with the CAA as a whole.

Accordingly, Respondent Board, pursuant to its narrow role respecting Section 2 U.S.C. 1317(a), was given no authority by Congress to engage in substantive policymaking respecting Petitioner's private right of redress and

cause of action based on retaliation. Nothing in this statutory provision or any other provision in the CAA authorizes Respondent Board to promulgate substantive regulations for said provision. Despite the absence of any statutory authority, Respondent Board, by its decision in *Bajbor* v. *Office of the Architect of the Capitol*, Case No. 01-AC-377 (RP) and its application to the instant matter, substantively limited Petitioner's cause of action based on retaliation by denying Petitioner subject matter jurisdiction of his retaliatory claim based on "litigation tactics" employed by Respondent AOC during the prior litigation of *Commeree I*. Petitioner challenges the actions of Respondent Board as an illegal arrogation and aggrandizement of authority not conferred by the CAA. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Respondent Board exceeded its narrow role and statutory authority under 2 U.S.C. 1317. Respondent Board can make no claim that the terms of 2 U.S.C. 1317(a) provides substantive policymaking authority nor can it point to any other provision in the CAA giving it the necessary authority to promulgate the substantive parameters of said statute. Respondent Board would have the Court presume a delegation of power from Congress absent an express withholding of such power. This comes close to saying that Respondent Board has the power to do whatever it pleases merely by virtue of its existence, a suggestion that is incredible. Respondent Board's attempt to expand its jurisdiction has no basis whatsoever in the language of the statute or its legislative history.

Respondent Board's lack of authority in support of its decision in the instant matter is replicated by the lack of authority in support of Respondent Board's recent decision in *Britton* v. *Office of the AOC*, Case No.02-AC-20 (CV, RP)

(May 23, 2005), hereinafter "*Britton*." The *Britton* decision, like the *Bajbor* decision and the instant *Commeree* decision provide no support for Respondent Board's authority for engaging in the substantive policymaking established in said decision. Respondent Board in *Britton* only reasserts "as new" the broad statutory parameters established by Congress in January 1995 when the CAA was enacted. See Sections II A through II C of the *Britton* decision. See App. 40-51.

Respondent Board's engagement in the substantive policymaking reflected in the "affirmative defense" of "litigation tactics" constitutes an aggrandizement and arrogation of authority and power; a gross violation of 2 U.S.C. 1317(a) of the CAA not the least of which unconstitutionally deprived Petitioner of his First Amendment right of redress and equal protection and Fifth Amendment guarantees of due process and equal protection. It is clear that Petitioner was entitled to a hearing on the merits of his cause of action based on retaliation in the instant matter.

II. RESPONDENT BOARD IS AN "UMPIRING AGENCY ONLY" WITH RESPECT TO 2 U.S.C. 1317(a)

Respondent Board and the *ad hoc* contract Hearing Officer, pursuant to their respective roles in the Administrative-Judicial Dispute Resolution Procedures of the CAA, are not policymakers with respect to their functions as decisionmakers charged with drawing a specific conclusion from the given set of facts at issue. See App. 30-35. To the extent that Respondent Board functions as an umpire, the relatively limited role of an administrative adjudicator and not as a policymaker, Respondent Board's decision is

not entitled to deference. Further, as substantive rulemaking authority with respect to 2 U.S.C. 1317(a) has been denied to the Respondent Board by Congress, Respondent Board is neither entitled to make substantive policy in the adjudicative setting nor to disguise policymaking as factfinding and thereby escape the legal and political limitations to which policymaking is subject. See *NLRB* v. *Curtin*, 494 U.S. 775, 819 (1990) citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). As the Board, with respect to 2 U.S.C. 1311 and 2 U.S.C. 1317(a) does not make policy, " . . . its interpretation of the [Chapter] . . . is not entitled to any special deference from the courts." See *Snowden* v. *Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 347 U.S.App.D.C. 12, 253 F.3d 725 (D.C.Cir. 06/19/2001) citing *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (citing *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 94 (D.C. Cir. 1980); *Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d 752, 757 n.5 (7th Cir. 1979); and see *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 48-49 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Term. Co.* v. *Caputo*, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977)

III. THE BROAD STATUTORY PARAMETERS OF 2 U.S.C. 1317(a)

Congress established a broad statutory parameter for claims of retaliation under 2 U.S.C. 1317(a). The broad statutory standard is consistent with and necessary for achievement of the primary statutory policy and goal of Congress: unfettered access to the remedial statutory mechanisms established for the implementation of the eleven statutes made applicable by the CAA. See App. 9-11. Any adverse treatment, whether pre or post litigation,

that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in any protected activity provided by said eleven statutes, regardless of the level of harm which goes to the issue of damages and not liability is prohibited by 2 U.S.C. 1317(a).

Respondent Board is not authorized, by notice and comment rulemaking or adjudication, to establish any substantive standard altering the broad statutory standard established by Congress respecting subject matter jurisdiction.

To construe 2 U.S.C. 1317(a) as providing Respondent Board, acting as an arbiter, with authority to establish substantive policy respecting "subject matter jurisdiction" is to expand the power of Respondent Board to an extent that Congress did not intend and has not authorized. It is axiomatic that an administrative agency's power is limited to the authority delegated by Congress. See *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988). Respondent Board can point to no authority – constitutional, statutory or case law – providing Respondent Board with the authority to promulgate regulations and standards pursuant to adjudicating a cause of action based on retaliation pursuant to 2 U.S.C. 1317(a). "This lack of specific attention to the statutory authorization is especially important . . . , that one factor to be considered in giving weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, . . .'" See *SEC* v. *Sloan,* 436 U.S. 103, 117-18 (1978) citing *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287 n.5 (1978). "'. . . [S]ince this Court can only speculate as to

the Commissions reasons for reaching the conclusion that it did, the mere [assertion], without a concomitant exegesis of the statutory authority for doing so, obviously lacks power to persuade' as to the existence of such authority." Id. at 118. "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' . . . But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291." *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968). Id. at 276.

Any assertion of power limiting Petitioner's legal arsenal amounts to Respondent Board's entrance into substantive policymaking Congress has neither countenanced nor authorized. See *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-498 (1960). "The role assumed by [the] Board in this area is fundamentally inconsistent with the structure of the Act and the functions of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." See *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

Justice White, speaking for the Court in *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) stated that "[Courts] must reject administrative

constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." See *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965).

There is no place in the context of the statutory scheme of the CAA providing for Respondent Board to substantively limit the broad subject matter jurisdiction created by Congress that is reflected in the *Bajbor* decision that is applied to and replicated in the instant matter.

IV. RESPONDENT BOARD'S APPLICATION OF THE *BAJBOR* DECISION TO THE INSTANT MATTER IS INCOMPATIBLE WITH THE COMPREHENSIVE STATUTORY SCHEME OF THE CAA RESPECTING THE PROMULGATION OF SUBSTANTIVE REGULATIONS

An administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop. See *United States* v. *An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969).

In determining whether Congress has spoken to depriving Respondent Board authority to promulgate substantive regulations for 2 U.S.C. 1317(a) in the adjudicative setting the Court must consider the CAA as written and as a whole and recognize that Congress, pursuant to its political structure, was forced to establish a comprehensive scheme for the promulgation of regulations by due

process notice and comment rulemaking to accommodate the separate and distinct Congressional jurisdictions subject to the CAA: the Senate, the House and the Congressional instrumentalities.

A standard promulgated by adjudication based on a particular complaint, a particular petitioner and a particular respondent may only apply to that particular jurisdiction, particular petitioner and particular respondent. It is Congress who deliberates and determines, by one-House resolution, concurrent resolution or joint resolution with presentment to the President, what substantive policy, standards and regulations are acceptable to their respective Houses.

The comprehensive statutory scheme and administrative procedures of the CAA accommodate both the political and power structure and specific intent of Congress to reserve exclusive control over itself by maintaining authority to determine, pursuant to the deliberative process, the substantive policies applying to their respective jurisdictions. Policymaking, by adjudicative ruling, inverts the statutory reservation of the authority of Congress.

The breadth of policy afforded by the promulgation of substantive policy, standards and regulations in the adjudicative setting far exceeds the parameters of authority Congress devised in the comprehensive administrative-judicial statutory regulations policing itself.

Given the political significance of the CAA, it is extremely unlikely that Congress intended to place the promulgation of substantive policymaking in the hands of the five unelected attorneys who serve as the Board of Directors of the Office of Compliance.

It was the elected Congress, not the appointed Board of Directors, who made the Contract with America which enacted the CAA. Congress, pursuant to its political promise, made Congress subject to the same laws as everyone else. It was and is the Congress who possesses the broad constitutional authority to govern its own members and employees. See Article I. United States Constitution and 2 U.S.C. 1431; 2 U.S.C. 1384 and 2 U.S.C. 1302(b)(3).

Congress jealously guards the sovereignty of its institution against intrusions by the executive branch, asserting the separation of powers principle as a barrier to each incursion by Cabinet officers and administrative bodies. *Mistretta* v. *United States*, 488 U.S. 361 (1989). The same jealously guards the sovereignty of the respective Houses of Congress against each other and against their respective Congressional instrumentalities. See 2 U.S.C. 1431; 2 U.S.C. 1384 and 2 U.S.C. 1302(b)(3). See App. 35; 10-11; and, 22-26.

Promulgation of substantive regulations by Respondent Board's assertion and exercise of jurisdiction in the adjudicative setting contradicts the clear intent of Congress to maintain the power and control revealed in the comprehensive statutory scheme set forth in 2 U.S.C. 1431, 2 U.S.C. 1384 and 2 U.S.C. 1302(b)(3).

An administrative agency may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988). Congress, by 2 U.S.C. 1384, spoke to the manner in which substantive regulations were to be promulgated.

It is clear, based on the overall statutory and regulatory scheme of the CAA, that Congress spoke to the question at issue and evidenced a clear intent to preclude a substantive policymaking role for Respondent Board with respect to 2 U.S.C. 1317(a) by the adjudicative process. The authority exercised by Respondent Board in the instant matter is clearly inconsistent with the due process notice and comment rulemaking procedures set forth in 2 U.S.C. 1384. The authority exercised by Respondent Board in the instant matter is *ultra vires*, unlawful and impermissible.

V. RESPONDENT BOARD'S APPLICATION OF THE *BAJBOR* DECISION TO THE INSTANT MATTER IS INCOMPATIBLE WITH THE COMPREHENSIVE STATUTORY SCHEME PROVIDED IN THE ADMINISTRATIVE-JUDICIAL DISPUTE RESOLUTION PROCEDURES OF THE CAA

It is clear that Respondent Board's decision in *Bajbor*, made applicable to the instant matter, is incompatible with and abrogates the comprehensive statutory scheme established by Congress in the Administrative-Judicial Dispute Resolution Procedures of the CAA. See 27-30.

The subject matter of the Petitioner's instant claim of retaliation, misrepresentations of material facts and law to the Court in the consolidated action identified as *Commeree I*, occurred subsequent to the filing by Petitioner of his Requests for Counseling in said consolidated action requiring Petitioner to submit a "new" Request for Counseling and to participate in a "new" mediation to fulfill the mandatory exhaustion of remedies requirements respecting the instant claims of retaliation. Congress made no

provision for the waiving of the exhaustion of remedy requirements set forth in the Administrative-Judicial procedures contained in 2 U.S.C. 1402-2 U.S.C. 1404. See App. 28-30.

The subject matter of *Commeree I* and the instant matter reflect separate and distinct time frames and separate and distinct factual patterns. The two claims did not arise out of the same transaction or occurrence, but rather the instant matter was born from the other. Respondent Board, by its decision in *Bajbor,* made applicable to the instant matter, abrogates the mandatory "exhaustion of remedies" requirements enacted by Congress and set forth in said Administrative-Judicial Dispute Resolution Procedures of the CAA. More importantly the application of *Bajbor* to the instant matter deprives Petitioner of his First Amendment right of redress.

The Court cannot help but to recognize the dilemma created by the "affirmative defense" of "litigation tactics" established by the *Bajbor* decision as applied to the instant matter: the CAA, when used by Petitioner in the manner prescribed by Congress, provides no protection from retaliation and reprisal subsequent to the filing of his Request for Counseling in *Commeree I.* The purported benefits from using the statute are clearly outweighed by the constitutional violations suffered by Petitioner respecting the loss of his First Amendment right of redress; the loss of his Fifth Amendment property interest in his cause of action based on retaliation; and his loss of his Fifth Amendment guarantee of equal protection.

Respondent Board's "affirmative defense" of "litigation tactics" eviscerates any reasonable assurance of protection

afforded a petitioner who participates in the Administrative-Judicial Dispute Resolution Procedures of the CAA. The *Bajbor* decision effects a rejection of the CAA not just a chill in the use of the CAA; an effect contrary to the intent of Congress and its "Contract with America." The *Bajbor* decision guts the very "protections" and purpose provided by 2 U.S.C. 1317(a).

Respondent Board's decision in *Bajbor* and applied in the instant matter is a perverse reading of the 2 U.S.C. 1317(a) in particular and the CAA generally. The *Bajbor* decision is incompatible with the core objective of ensuring protection for participation and use of the Administrative-Judicial Dispute Resolution Procedures of the CAA. Respondent Board, by its *Bajbor* decision as applied to the instant matter, places its imprimatur on Respondent AOC's engagement in abusive "litigation tactics" pursuant to the "litigation" of *Commeree I.* The inescapable conclusion is that there is no place in the statutory scheme established by Congress for the limitation of subject matter jurisdiction established by the *Bajbor* decision.

VI. THE PETITION OF THE FIRST AMENDMENT OBLIGATED RESPONDENT BOARD TO PROVIDE PETITIONER WITH A HEARING ON THE MERITS OF HIS CAUSE OF ACTION BASED ON RETALIATION

The instant *Commeree* matter, an "Administrative-Judicial complaint," concerns a request for resolution of a retaliation dispute submitted in accordance with the Administrative Judicial Dispute Resolution Procedures established by Congress as the mechanism to redress claims of retaliation brought pursuant to the CAA.

In the instant matter, Petitioner, pursuant to 2 U.S.C. 1317(a), brought an action based on unlawful retaliation based on Petitioner's prior participation in the federal protected activities associated with his prosecution of *Commeree I*: the Administrative-Judicial Dispute Resolution Procedures of the CAA.

Petitioner based his claims of retaliation on the abusive "litigation tactics" employed by Respondent AOC during the litigation of *Commeree I:* material misrepresentations of facts and law made to the Court by way of motions and oral argument.

Courts have characterized said conduct, abusive "litigation tactics," as implicating the constitutional right of access to the courts whether grounded in the First, Fifth or Fourteenth Amendment: an interference with and infringement of a petitioner's meaningful right of redress intended to deny a petitioner a meaningful opportunity to be heard so as to defeat the causes of action brought against a respondent.

The Supreme Court and other federal courts have uniformly recognized a constitutional right of access to the courts, though the source of that right has not always been consistently and clearly defined. See, e.g., *Bounds* v. *Smith*, 430 U.S. 817 (1977); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (due process); *Douglas* v. *California*, 372 U.S. 353 (1963) (equal protection); *Hilliard* v. *Board of Pardons and Paroles*, 759 F.2d 1190 (5th Cir. 1985) (equal protection).

The principle that an employee has a right "to resort to the laws of his country for a remedy" has evolved into the well-settled notion that every individual has a general right to seek administrative-judicial redress in the courts

for his grievances. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) and *Chambers* v. *Baltimore and Ohio R.R.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts in the alternative of force. . . . It is one of the highest and most essential privileges of [Petitioner's employment] . . . " Additionally, this Court has stated that "the right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). The Court has noted that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967), and that it has "a sanctity and a sanction not permitting dubious intrusions," *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). As an aspect of the First Amendment right to petition, the right of access to the courts shares this "preferred place" in our hierarchy of constitutional freedoms and values. Access to the Court's has further been identified as a constitutional right guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. *Harbolt* v. *Alldredge*, 464 F.2d 1243, 1244 (10th Cir. 1972), *cert. denied*, 409 U.S. 1025, 93 S. Ct. 473, 34 L. Ed. 2d 319 (1972); *Evans* v. *Moseley*, 455 F.2d 1084, 1087 (10th Cir. 1972). This right of access to the courts cannot be infringed upon or burdened. *Adams* v. *Carlson*, 488 F.2d 619, 630 (7th Cir. 1973).

Respondent Board, by reasserting and applying its unauthorized and arbitrary decision in *Bajbor* to the instant matter, arbitrarily and without delegated authorization deprived Petitioner's instant claims of subject matter jurisdiction as a matter of law. "As we held in *Bajbor*, a party must deal with its opponent's litigation actions before that very tribunal hearing the substantive

claims. The doctrines of *res judicata* and *collateral estoppel* preclude a party from collaterally challenging that tribunal's judgment by bringing a new action before the Office of Compliance. The Office simply will not entertain such complaints." Id. at App. 4.

Petitioner characterizes the unauthorized and arbitrary decision of Respondent Board as violating and implicating his constitutional right of redress whether grounded in the First or Fifth Amendments: an interference with and infringement of Petitioner's meaningful right of redress intended to deny Petitioner a meaningful opportunity to be heard.

By way of analogy to case law respecting the constitutional right of redress, whether grounded in the First, Fifth or Fourteenth Amendment, Petitioner demonstrates not only the absence of the preclusive doctrines of *res judicata* and *collateral estoppel* but support for the subject matter jurisdiction of his retaliatory claims.

Current jurisprudence governing the right of access to court includes those claims that take place after a claim has already been filed.

The Second Circuit has stated that the right to petition protects all property rights, including any "vested rights of action." *Barrett* v. *United States*, 798 F.2d 565, 575 (2d Cir. 1986). Under this broad construction, the constitutional inquiry is straightforward: "unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim." The Court also allowed a denial of access claim to proceed even though the underlying claim had been fully litigated and had resulted in a settlement. Id. at 577-78.

The Seventh Circuit agreed to hear an appeal where the plaintiffs alleged that police mishandling of evidence thwarted their ability to recover money stolen from them by a third party. *Harrell* v. *Cook*, 169 F.3d 428, 430 (7th Cir. 1999). The court ultimately dismissed the claim, but in an important clarification of the access right, stated that had the plaintiffs alleged that the police intentionally misplaced or destroyed the evidence, the claim would have survived. Id. at 432-33.

The Seventh Circuit determined that litigation abuses that took place during the course of litigation contributed in denying the plaintiffs adequate access to the courts. *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1263 n.7 (7th Cir. 1984). The Court found a clear case of constitutional injury even though a coverup was eventually uncovered and the wrongful death suit was successfully litigated. The court stated that even though the original claim had been litigated to completion, the denial-of-access claim was nonetheless valid because the conspiracy had "rendered hollow" the right to seek redress. Id. at 1261.

Access to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be "adequate, effective and meaningful." *Swekel* v. *City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997). Other courts have also observed that although the right "in its most formal manifestation protects a person's right to physically access the court system . . . without more . . . such an important right would ring hollow in the halls of justice." Id. The Court aptly noted that to impose a merely formalistic interpretation of the right would entirely defeat its purpose.

In *Harrison* v. *Springdale Water and Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986), the plaintiffs alleged that they filed suit in state court against the Commission and the City, and that the defendants conspired to force them to settle their lawsuit and to sell their property to the City by filing a frivolous condemnation counterclaim. The Eighth Circuit found that the factual allegations in the complaint were sufficient to state a claim under 42 U.S.C. 1983 for infringement of the Harrisons' constitutional right of access to the courts. The Court found that if such allegations were proved at trial, the Harrisons were entitled to recover damages for infringement of their constitutional right of access to the courts.

The Court determined that it had essentially two different cases. The first was a condemnation counterclaim based ostensibly on a perceived public purpose. The second was a 42 U.S.C. 1983 claim based on an alleged infringement of the constitutional right of access to the courts. It was difficult for the Court to see how the Harrisons' claim arose out of the same "transaction or occurrence" as the Commission's condemnation counterclaim. The two claims did not arise out of the same transaction or occurrence, but rather one was born from the other.

The Court also questioned whether the Harrisons could have asserted any damage counterclaim in the prior proceeding. "A party's counterclaim is not compulsory if it cannot be asserted in the same proceeding as the opposing party's claim." *Edwards* v. *Arkansas Power & Light Co.*, 683 F.2d 1149, 1158 (8th Cir. 1982) (applying Arkansas law). In *Edwards*, the Court noted that "just compensation is the sole issue for determination in an eminent domain proceeding," id. at 1154, and went on to state that "obviously, if the plaintiffs could not have asserted their action

in state court, their failure to do so cannot justify the invocation of the *res judicata* and compulsory counterclaim doctrines against them here." Id. at 1155.

Based on precedent, the Court concluded that under Arkansas law the Harrisons' present Section 1983 claim was not a compulsory counterclaim which should have been asserted in the prior chancery court proceeding and that the District Court erred in holding to the contrary and in dismissing the complaint on the basis of *res judicata*.

Respondents, based on their inaccurate assumption that Petitioner was collaterally attacking the decision in *Commeree I* and similar to the District Court in *Harrison*, misconstrue the instant *Commeree* matter as being barred as a matter of law pursuant to the *Bajbor* decision and the preclusive doctrines of *res judicata* and *collateral estoppel*.

Respondents fail to recognize that proving abusive "litigation tactics" in *Commeree I* is the full extent of the retaliation claims in the instant matter. Once the claim is proven the question becomes solely one of damages. To the extent that litigation of *Commeree I* is needed, it is only to help determine the extent of total damages. Litigating the underlying claim, *Commeree I* only helps the court to determine how severely the claim was prejudiced to better assess the damages to be awarded. The sole purpose of a litigation requirement would be to assess injury in the instant matter, not to determine the underlying claim's validity.

Examination of the constitutional right of redress as addressed herein demonstrates that said constitutional right encompasses the right to receive a fair hearing as well as the right to submit a claim. It is clear that those protections that guarantee the right's freedom from

government interference must properly be seen as extending to the entire course of litigation. If petitioning activity is to be protected it follows that the entire process must be insulated from government intervention. The Framers of the Constitution included the petition right in the Bill of Rights as one of the several enumerated "fundamental" rights of citizens upon which the government could not infringe absent a compelling interest which Respondent Board has failed to provide.

Congress, by enacting the Administrative-Judicial Dispute Resolution Procedures, fulfilled its obligation under the Petition Clause of the First Amendment to Petitioner, a covered employee, by providing the mechanism for seeking redress for his grievances. The First Amendment imposes this duty on the federal government, the Fourteenth Amendment imposes it on state and local governments. *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442 (3d Cir. 1994).

Petitioner invoked the mechanism when he submitted his Requests for Counseling in *Commeree I* and the instant matter; the specific step necessary to gain redress of his concerns.

Petitioner contends that Congress cannot provide the mechanism used by a covered employee in petitioning the government and then effectively deny said employee its meaningful use by rewarding Respondent AOC the grant of absolute immunity provided by the *Bajbor* decision.

Petitioner contends that the absolute grant of immunity provided an employing office by the *Bajbor* decision is contrary to the intent of Congress and the protections created by 2 U.S.C. 1317(a).

Petitioner contends that Respondent Board was required and failed to act in accordance with legitimate statutory authority when it decided the *Bajbor* matter and applied it to the instant matter.

Petitioner contends that Respondent Board, pursuant to its aggrandizement of power and authority and absent a reasoned and compelling explanation, placed those employees recognized by Congress as marginalized pursuant to the immutable characteristics of race, color, sex, national origin, age and disability in a far worse category for having sought redress of their grievances by engaging in the use of the Administrative-Judicial Dispute Resolution Procedures of the CAA than had they not engaged in the use of the CAA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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202 362-0682
202 244-1120

Counsel for Petitioner

June 27, 2005

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-6001

VIATEUR COMMEREE,

Petitioner,

v.

OFFICE OF COMPLIANCE,

Respondent,

and

OFFICE OF ARCHITECT OF THE CAPITOL,

Respondent.

Judgment

ON PETITION for review of a decision of the Board of Directors of the Office of Compliance.

In CASE NO(S). 02-AC-30 (DA, RP).

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (BRYSON, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and PROST, *Circuit Judge*.)

AFFIRMED. *See* Fed. Cir. R.36

ENTERED BY ORDER OF THE COURT

DATED: DEC 15 2004

/s/ Jan Horbaly [Illegible]
Jan Horbaly, Clerk

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

VIATEUR COMMEREE	)	
	)	
Complainant,	)	**Case No.**
	)	**02-AC-30 (DA, RP)**
v.	)	**Date: August 11, 2003**
	)	
OFFICE OF THE ARCHITECT OF THE CAPITOL	)	
	)	
Respondent.	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

On February 6, 2003, Hearing Office[r] Curtis E. von Kann issued the attached Order dismissing this disability discrimination and reprisal complaint on the basis that it was untimely and, therefore, he was without jurisdiction to entertain the matter. The Complainant timely filed petition for review of the Hearing Officer's decision and a supporting brief. The Respondent employing office filed a brief in opposition to the petition for review.

Upon due consideration of the Hearing Officer's Order, and the parties' filings, the Board decided to affirm the dismissal Order but for the reasons explained below.

Complainant alleges herein that he did not prevail in earlier companion discrimination suits (*circa* 1999-2001) against the Respondent because the Respondent had

discriminatorily misrepresented important facts and law to both the federal trial and appellate courts. Complainant, in essence, is seeking the relief he would have received had he succeeded before those courts.

The Hearing Officer concluded that *he lacked jurisdiction* to entertain the complaint because the Complainant had not complied with the 180-day time limitation imposed by Section 402(a) of the Congressional Accountability Act, *2 U.S.C. § 1402(a)*. Contrary to the Hearing Officer, we note that the 180-day time limitation is in the nature of a statute of limitations rather than a jurisdictional requirement. Accordingly, it is subject to equitable tolling, but only in extraordinary and carefully circumscribed instances. *See, Clarence Seay, Jr. v. Tennessee Valley Authority, et al., 2003 U.S. App. LEXIS 16022 (6th Cir. 08/06/2003)*; *Monday v. Secretary of the United States Sergeant-at-Arms,* Office of Compliance Case No. 98-SN-56 (RP) (September 8, 1999); *Kenneth F. Thompson v. The Capitol Police Board*, 120 F. Supp. 2d 78 (2000); *Gloria Halcomb v. Office of Senate Sergeant-at-Arms*, 209 F. Supp.2d 175 (2002).

However, we do not decide whether the Complaint was timely filed, as we hold that the Complaint does not state a cause of action under the Act as a matter of law. The Hearing Officer explicitly declined to rule whether Respondent's aforementioned alleged misrepresentations before the courts could be held to constitute new and independent acts of discrimination and retaliation against the Complainant. Subsequent to the Hearing Officer's decision and in the context of another case, the Board applied the preclusive legal doctrines of *res judicata* and *collateral estoppel* to bar consideration of an independent retaliation complaint predicated upon a Party's litigating

tactics in an earlier case before the Office of Compliance. *See Ziggy Bajbor v. Office of the Architect of the Capitol,* Case No. 01-AC-377 (RP) (May 30, 2003). We believe that doctrine is fully applicable to this case. As we held in *Bajbor*, a party must deal with its opponent's litigation actions before that very tribunal hearing the substantive claims. The doctrines of *res judicata* and *collateral estoppel* preclude a party from collaterally challenging that tribunal's judgment by bringing a new action before the Office of Compliance. The Office simply will not entertain such complaints.

For the foregoing reasons, the Hearing Officer's Order dismissing the complaint is affirmed.

It is so ordered.

Issued: at Washington, D.C., August 11, 2003

OFFICE OF COMPLIANCE

Viateur Commeree, Employee vs. Office of the Architect of the Capitol, Employing Office.	Case Number: 02-AC-30 (DA, RP)

ORDER

Complainant has previously prosecuted against his former employer, the Office of the Architect of the Capitol ("AOC"), four separate proceedidngs under the Congressional Accountability Act of 1995 ("CAA"). Those proceedings resulted in the filing of four separate complaints in the United States District Court for the District of Columbia. The District Court eventually dismissed the Complaints, and the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal.

In this fifth Complaint against AOC, complainant contends that AOC committed new acts of discrimination and retaliation against him when its counsel allegedly made deliberate misrepresentations of fact and law to the District Court and the Court of Appeals in the prior cases, thus prompting those courts to deny him relief.

In its Motion to Dismiss or for Summary Judgment, Respondent AOC has raised numerous challenges to the maintenance of the instant action. It is only necessary to consider one of those challenges, which is plainly dispositive of the matters at issue.

Under Section 402(a) of the CAA, in order to commence a proceeding in the Office of Compliance, a covered employee must begin by requesting counseling by the Office, a covered employee must begin by requesting counseling by the Office, and "[a] request for counseling shall be made not later than 180 days after the date of the alleged violation." Any complaint with respect to violations which allegedly occurred more than 180 days before the request for counseling is untimely, and a Hearing Officer is without jurisdiction to entertain the matter.

In this case, the request for counseling was made on May 2, 2002. Accordingly, this Hearing Officer is without jurisdiction to consider alleged violations which occurred prior to November 2, 2001.

At page 21 of his Opposition to Respondent's Motion for Summary Judgment, complainant cites his Exhibits K-X as containing the "intentional and deliberate misrepresentations of fact and law" which constitute the discriminatory and retaliatory acts and practices of which he here complains. All of those documents were submitted to the respective courts well before November 2, 2001; the latest document containing any representations of AOC (Exhibit W) is dated August 24, 2001. While Exhibit AA, not cited by Complainant as a basis of his complaint, is dated November 8, 2001, slightly after the November 2, 2001 cutoff date, that Exhibit merely quotes earlier (time-barred) representations in AOC's brief and makes no new representations.

Consequently, even if, arguendo, the employing office here, through its counsel, made intentionally false representations to the District Court and Court of

Appeals concerning complainant's discharge and such representations could be held to constitute new and independent act of discrimination and retaliation against complainant, a matter which the Hearing Officer expressly declines to decide at this time, all such acts occurred more than 180 days prior to complainant's request for counseling herein. Thus, this Hearing Officer is without jurisdiction to consider such a complaint.

Accordingly, the complaint herein is dismissed for want of jurisdiction.

February 6, 2002 /s/ Curtis E. von Kann
Curtis E. von Kann
Hearing Officer

United States Court of Appeals for the Federal Circuit

ORDER

(Filed Mar 28, 2005)

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 4, 2005.

FOR THE COURT

/s/ Jan Horbaly (av)
Jan Horbaly
Clerk

Dated: March 28, 2005

cc: Jeffrey H. Leib
Peter Eveleth, Matthew M. Collette

COMMEREE V OOC AND OAC, 04-6001
(PERS-02-AC-30 (DA, RP))

* *

* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *

* *

UNITED STATES CODE
CONGRESSIONAL ACCOUNTABILITY ACT
2 U.S.C. 1301 *et seq.*

Section 1302. Application of laws

(a) Laws made applicable

The following laws shall apply, as prescribed by this chapter, to the legislative branch of the Federal Government:

(1) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 2101 et seq.).

(4) The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.).

(5) The Family and Medical Leave Act of 1993 (29 U.S.C. 2611 et seq.).

(6) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

(7) Chapter 71 (relating to Federal service labor-management relations) of title 5.

(8) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).

(9) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.).

(10) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

(11) Chapter 43 (relating to veterans' employment and reemployment) of title 38. * * *

(b) Laws which may be made applicable

(1) In general

The Board shall review provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees, and (B) access to public services and accommodations.

(2) Board report

Beginning on December 31, 1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree the provisions described in paragraph (1) are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch. The presiding officers of the House of Representatives and the Senate shall cause each such report to be printed in the Congressional Record and each such report shall be referred to the committees of the House of Representatives and the Senate with jurisdiction.

(3) Reports of congressional committees

Each report accompanying any bill or joint resolution relating to terms and conditions of employment or access to public services or accommodations reported by a committee of the House of Representatives or the Senate shall –

(A) describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch; or

(B) in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply.

On the objection of any Member, it shall not be in order for the Senate or the House of Representatives to consider any such bill or joint resolution if the report of the committee on such bill or joint resolution does not comply with the provisions of this paragraph. This paragraph may be waived in either House by majority vote of that House.

* * *

Section 1311. Rights and protections under title VII of Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Rehabilitation Act of 1973, and title I of Americans with Disabilities Act of 1990

(a) Discriminatory practices prohibited

All personnel actions affecting covered employees shall be made free from any discrimination based on –

(1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-12114).

(b) Remedy

(1) Civil rights

The remedy for a violation of subsection (a)(1) of this section shall be –

(A) such remedy as would be appropriate if awarded under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)); and

(B) such compensatory damages as would be appropriate if awarded under section 1981 of title 42, or as would be appropriate if awarded under sections 1981a(a)(1), 1981a(b)(2), and, irrespective of the size of the employing office, 1981a(b)(3)(D) of title 42.

(2) Age discrimination

The remedy for a violation of subsection (a)(2) of this section shall be –

(A) such remedy as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)); and

(B) such liquidated damages as would be appropriate if awarded under section 7(b) of such Act (29 U.S.C. 626(b)).

In addition, the waiver provisions of section 7(f) of such Act (29 U.S.C. 626(f)) shall apply to covered employees.

(3) Disabilities discrimination

The remedy for a violation of subsection (a)(3) of this section shall be –

(A) such remedy as would be appropriate if awarded under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)) or section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)); and

(B) such compensatory damages as would be appropriate if awarded under sections 1981a(a)(2), 1981a(a)(3), 1981a(b)(2), and, irrespective of the size of the employing office, 1981a(b)(3)(D) of title 42.

(c) Omitted

(d) Effective date

This section shall take effect 1 year after January 23, 1995.

Section 1312. Rights and protections under Family and Medical Leave Act of 1993

* * *

(d) Regulations.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement the rights and protections under this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1313. Rights and protections under Fair Labor Standards Act of 1938

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

Except as provided in paragraph (3), the regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1314. Rights and protections under Employee Polygraph Protection Act of 1988

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) of this section except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1315. Rights and protections under Worker Adjustment and Retraining Notification Act

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except insofar as the Board may

determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1316. Rights and protections relating to veterans' employment and reemployment

* * *

(c) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1317. Prohibition of Intimidation or Reprisal

(a) In General.

It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the

covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

(b) Remedy.

The remedy available for a violation of subsection (a) of this section shall be such legal or equitable remedy as may be appropriate to redress a violation of subsection (a) of this section.

Section 1331. Rights and protections under Americans with Disabilities Act of 1990 relating to public services and accommodations; procedures for remedy of violations

* * *

(e) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency regulations

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1341. Rights and protections under Occupational Safety and Health Act of 1970; procedures for remedy of violations

* * *

(d) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Section 1351. Application of chapter 71 of title 5 relating to Federal service labor-management relations; procedures for remedy of violations

* * *

(d) Regulations to Implement Section.

(1) In General.

The Board shall, pursuant to section 1384 of this title, issue regulations to implement this section.

(2) Agency Regulations.

Except as provided in subsection (e) of this section, the regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority to implement the statutory provisions referred to in subsection (a) of this section except –

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; or

(B) as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest.

(e) Specific regulations regarding application to certain offices of Congress

(1) Regulations Required.

The Board shall issue regulations pursuant to section 1384 of this title on the manner and extent to which the requirements and exemptions of chapter 71 of title 5 should apply to covered employees who are employed in the offices listed in paragraph

(2) The regulations shall, to the greatest extent practicable, be consistent with the provisions and purposes of chapter 71 of title 5 and of this chapter, and shall be the same as substantive regulations issued by the Federal Labor Relations Authority under chapter 71 of title 5, except –

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such

regulations would be more effective for the implementation of the rights and protections under this section; and

(B) that the Board shall exclude from coverage under this section any covered employees who are employed in offices listed in paragraph (2) if the Board determines that such exclusion is required because of –

(i) a conflict of interest or appearance of a conflict of interest; or

(ii) Congress' constitutional responsibilities.

(2) Offices referred to

The offices referred to in paragraph (1) include –

(A) the personal office of any Member of the House of Representatives or of any Senator;

(B) a standing, select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(C) the Office of the Vice President (as President of the Senate), the Office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate,

the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate:

Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(D) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;

(E) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;

(F) the offices of any caucus or party organization;

(G) the Congressional Budget Office, the Office of Technology Assessment, and the Office of Compliance; and

(H) such other offices that perform comparable functions which are identified under regulations of the Board.

Section 1384. Substantive Regulations.

a) Regulations.

(1) In General. The procedures applicable to the regulations of the Board issued for the implementation of this chapter, which shall include regulations the Board is required to issue under subchapter II of this chapter (including regulations on the appropriate application of exemptions under the laws made applicable in subchapter II of this chapter) are as prescribed in this section.

(2) Rulemaking Procedure – Such regulations of the Board –

(A) shall be adopted, approved, and issued in accordance with subsection (b) of this section; and

(B) shall consist of 3 separate bodies of regulations, which shall apply, respectively, to –

(i) the Senate and employees of the Senate;

(ii) the House of Representatives and employees of the House of Representatives; and

(iii) all other covered employees and employing offices.

b) Adoption by the Board. The Board shall adopt the regulations referred to in subsection (a)(1)

of this section in accordance with the principles and procedures set forth in section 553 of title 5 and as provided in the following provisions of this subsection:

(1) Proposal. The Board shall publish a general notice of proposed rulemaking under section 553(b) of title 5, but, instead of publication of a

general notice of proposed rulemaking in the Federal Register, the Board shall transmit such notice to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal. Such notice shall set forth the recommendations of the Deputy Director for the Senate in regard to regulations under subsection(a)(2)(B)(i) of this section, the recommendations of the Deputy Director for the House of Representatives in regard to regulations under subsection (a)(2)(B)(ii) of this section, and the recommendations of the Executive Director for regulations under subsection (a)(2)(B)(iii) of this section.

(2) Comment. Before adopting regulations, the Board shall provide a comment period of at least 30 days after publication of a general notice of proposed rulemaking.

(3) Adoption. After considering comments, the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.

(4) Recommendation as to method of approval.

The Board shall include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution.

(c) Approval of Regulations.

(1) In General. Regulations referred to in paragraph (2)(B)(i) of subsection (a) of this section may be approved by the Senate by resolution or by the Congress by concurrent resolution or by joint resolution. Regulations referred to in paragraph (2)(B)(ii) of subsection (a) of this section may be approved by the House of Representatives by resolution or by the Congress by concurrent resolution or by joint resolution. Regulations referred to in paragraph (2)(B)(iii) may be approved by Congress by concurrent resolution or by joint resolution.

(2) Referral. Upon receipt of a notice of adoption of regulations under subsection (b)(3) of this section, the presiding officers of the House of Representatives and the Senate shall refer such notice, together with a copy of such regulations, to the appropriate committee or committees of the House of Representatives and of the Senate. The purpose of the referral shall be to consider whether such regulations should be approved, and, if so, whether such approval should be by resolution of the House of Representatives or of the Senate, by concurrent resolution or by joint resolution.

(3) Joint Referral and Discharge in the Senate.

The presiding officer of the Senate may refer the notice of issuance of regulations, or any resolution of approval of regulations, to one committee or jointly to more than one committee. If a committee of the Senate acts to report a jointly referred measure, any other committee of the Senate must act within 30 calendar days of continuous session, or be automatically discharged.

(4) One-House Resolution or Concurrent Resolution.

In the case of a resolution of the House of Representatives or the Senate or a concurrent resolution referred to in paragraph (1), the matter after the resolving clause shall be the following:

"The following regulations issued by the Office of Compliance on ___ are hereby approved:" (the blank space being appropriately filled in, and the text of the regulations being set forth).

(5) Joint Resolution.

In the case of a joint resolution referred to in paragraph (1), the matter after the resolving clause shall be the following:

"The following regulations issued by the Office of Compliance on ___ are hereby approved and shall have the force and effect of law:" (the blank space being appropriately filled in, and the text of the regulations being set forth).

(d) Issuance and Effective Date.

(1) Publication. After approval of regulations under subsection (c) of this section, the Board shall submit the regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.

(2) Date of Issuance. The date of issuance of regulations shall be the date on which they are published in the Congressional Record under paragraph (1).

(3) Effective Date. Regulations shall become effective not less than 60 days after the regulations are issued, except that the Board may provide for

an earlier effective date for good cause found (within the meaning of section 553(d)(3) of title 5 and published with the regulation.

(e) Amendment of Regulations. Regulations may be amended in the same manner as is described in this section for the adoption, approval, and issuance of regulations, except that the Board may, in its discretion, dispense with publication of a general notice of proposed rulemaking of minor, technical, or urgent amendments that satisfy the criteria for dispensing with publication of such notice pursuant to section 553(b)(B) of title 5.

(f) Right to Petitioner for Rulemaking. Any interested party may petition to the Board for the issuance, amendment, or repeal of a regulation.

(g) Consultation. The Executive Director, the Deputy Directors, and the Board –

(1) shall consult, with regard to the development of regulations, with –

(A) the Chair of the Administrative Conference of the United States;

(B) the Secretary of Labor;

(C) the Federal Labor Relations Authority; and

(D) the Director of the Office of Personnel Management; and

(2) may consult with any other persons with whom consultation, in the opinion of the Board, the Executive Director, or Deputy Directors, may be helpful.

* * *

Section 1401. Procedure for consideration of alleged violations

Except as otherwise provided, the procedure for consideration of alleged violations of part A of subchapter II of this chapter consists of –

(1) counseling as provided in section 1402 of this title;

(2) mediation as provided in section 1403 of this title; and

(3) election, as provided in section 1404 of this title, of either –

(A) a formal complaint and hearing as provided in section 1405 of this title, subject to Board review as provided in section 1406 of this title, and judicial review in the United States Court of Appeals for the Federal Circuit as provided in section 1407 of this title, or

(B) a civil action in a district court of the United States as provided in section 1408 of this title.

In the case of an employee of the Office of the Architect of the Capitol or of the Capitol Police, the Executive Director, after receiving a request for counseling under section 1402 of this title, may recommend that the employee use the grievance procedures of the Architect of the Capitol or the Capitol Police for resolution of the employee's grievance for a specific period of time, which shall not count against the time available for counseling or mediation.

Section 1402. Counseling

(a) In General.

To commence a proceeding, a covered employee alleging a violation of a law made applicable under Part A of title II shall request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the date of the alleged violation.

(b) Period of Counseling.

The period of counseling shall be 30 days unless the employee and the Office agree to reduced the period. The period shall begin on the date the request for counseling is received.

(c) Notification of end of counseling period.

The Office shall notify the employee in writing when the counseling period has ended.

Section 1403. Mediation

(a) Initiation.

Not later than 15 days after receipt by the employee of notice of the end of the counseling period under section 1402, but prior to and as a condition of making an election under section 1404, the covered employee who alleged a violation of a law shall file a request for mediation with the Office.

(b) Process.

Mediation under this section –

(1) may include the Office, the covered employee, the employing office, and one or more

individuals appointed by the Executive Director after considering recommendations by organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters, and

(2) shall involve meetings with the parties separately or jointly for the purpose of resolving the dispute between the covered employee and the employing office.

(c) Mediation period.

The mediation period shall be 30 days beginning on the date the request for mediation is received. The mediation period may be extended for additional periods at the joint request of the covered employee and the employing office. The Office shall notify in writing the covered employee and the employing office when the mediation period has ended.

(d) Independence of mediation process.

No individual, who is appointed by the Executive Director to mediate, may conduct or aid in a hearing conducted under section 1405 with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.

Section 1404. Election of proceeding

Not later than 90 days after a covered employee receives notices of the end of the period of mediation, but no sooner than 30 days after receipt of such notification, such covered employee may either –

(1) file a complaint with the Office in accordance with section 1405, or

(2) file a civil action in accordance with section 1408 in the United States District Court for the district in which the employee is employed or for the District of Columbia.

Section 1405. Complaint and hearing

(a) In general

A covered employee may, upon the completion of mediation under section 1403 of this title, file a complaint with the Office. The respondent to the complaint shall be the employing office –

(1) involved in the violation, or

(2) in which the violation is alleged to have occurred, and about which mediation was conducted.

(b) Dismissal

A hearing officer may dismiss any claim that the hearing officer finds to be frivolous or that fails to state a claim upon which relief may be granted.

(c) Hearing officer

(1) Appointment

Upon the filing of a complaint, the Executive Director shall appoint an independent hearing officer to consider the complaint and render a decision. No Member of the House of Representatives, Senator, officer of either the House of Representatives or the Senate, head of an employing office, member of the Board, or covered employee may be appointed to be a hearing officer. The Executive

Director shall select hearing officers on a rotational or random basis from the lists developed under paragraph (2). Nothing in this section shall prevent the appointment of hearing officers as full-time employees of the Office or the selection of hearing officers on the basis of specialized expertise needed for particular matters.

(2) Lists

The Executive Director shall develop master lists, composed of –

(A) members of the bar of a State or the District of Columbia and retired judges of the United States courts who are experienced in adjudicating or arbitrating the kinds of personnel and other matters for which hearings may be held under this chapter, and (B) individuals expert in technical matters relating to accessibility and usability by persons with disabilities or technical matters relating to occupational safety and health. In developing lists, the Executive Director shall consider candidates recommended by the Federal Mediation and Conciliation Service or the Administrative Conference of the United States.

(d) Hearing

Unless a complaint is dismissed before a hearing, a hearing shall be –

(1) conducted in closed session on the record by the hearing officer;

(2) commenced no later than 60 days after filing of the complaint under subsection (a) of this section, except that the Office may, for good cause, extend up to an additional 30 days the time for commencing a hearing; and

(3) conducted, except as specifically provided in this chapter and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5.

(e) Discovery

Reasonable prehearing discovery may be permitted at the discretion of the hearing officer.

(f) Subpoenas

(1) In general

At the request of a party, a hearing officer may issue subpoenas for the attendance of witnesses and for the production of correspondence, books, papers, documents, and other records. The attendance of witnesses and the production of records may be required from any place within the United States. Subpoenas shall be served in the manner provided under rule 45(b) of the Federal Rules of Civil Procedure.

(2) Objections

If a person refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with a proceeding before a hearing officer, the hearing officer shall rule on the objection. At the request of the witness or any party, the hearing officer shall (or on the hearing officer's own initiative, the hearing officer may) refer the ruling to the Board for review.

(3) Enforcement

(A) In general

If a person fails to comply with a subpoena, the Board may authorize the General Counsel to apply, in the name

of the Office, to an appropriate United States district court for an order requiring that person to appear before the hearing officer to give testimony or produce records. The application may be made within the judicial district where the hearing is conducted or where that person is found, resides, or transacts business. Any failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a civil contempt thereof.

(B) Service of process

Process in an action or contempt proceeding pursuant to subparagraph (A) may be served in any judicial district in which the person refusing or failing to comply, or threatening to refuse or not to comply, resides, transacts business, or may be found, and subpoenas for witnesses who are required to attend such proceedings may run into any other district.

(g) Decision

The hearing officer shall issue a written decision as expeditiously as possible, but in no case more than 90 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the parties. The decision shall state the issues raised in the complaint, describe the evidence in the record, contain findings of fact and conclusions of law, contain a determination of whether a violation has occurred, and order such remedies as are appropriate pursuant to subchapter II of this chapter. The decision shall be entered in the records of the Office. If a decision is not appealed under section 1406 of this title to the Board, the decision shall be considered the final decision of the Office.

(h) Precedents

A hearing officer who conducts a hearing under this section shall be guided by judicial decisions under the laws made applicable by section 1302 of this title and by Board decisions under this chapter.

Section 1406. Appeal to Board

(a) In general

Any party aggrieved by the decision of a hearing officer under section 1405(g) of this title may file a petition for review by the Board not later than 30 days after entry of the decision in the records of the Office.

(b) Parties' opportunity to submit argument

The parties to the hearing upon which the decision of the hearing officer was made shall have a reasonable opportunity to be heard, through written submission and, in the discretion of the Board, through oral argument.

(c) Standard of review

The Board shall set aside a decision of a hearing officer if the Board determines that the decision was –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

(d) Record

In making determinations under subsection (c) of this section, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) Decision

The Board shall issue a written decision setting forth the reasons for its decision. The decision may affirm, reverse, or remand to the hearing officer for further proceedings. A decision that does not require further proceedings before a hearing officer shall be entered in the records of the Office as a final decision.

Section 1431. Exercise of Rulemaking Powers

The provisions of sections 2 U.S.C. 1302(b)(3) and 2 U.S.C. 1384(c) of this title are enacted –

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of such House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of each House.

Office of Compliance: Decision, *Sherry M. Britton*, Appellant, *v. Office of Architect of the Capitol*, Appellee (May 23, 2005)

OFFICE OF COMPLIANCE
LA 200, John Adams Building,
110 Second Street, S.E.
Washington, DC 20540-1999

SHERRY M. BRITTON,

Appellant,

v.

OFFICE OF THE ARCHITECT OF THE CAPITOL,

Appellee.

Case No.
02-AC-20(CV, RP)
May 23, 2005

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

Complainant, Sherry Britton filed a claim against Respondent, the Office of the Architect of the Capitol, alleging among other things retaliation in violation of Section 207 of the Congressional Accountability Act ("CAA"), 2 U.S.C. 1317. The hearing officer dismissed the retaliation claim for failure to establish a sufficient "adverse action" as required to establish a *prima facie* case in Title VII retaliation cases. For the reasons that follow, we reverse and remand for further proceedings consistent with this opinion.

I. Background

Sherry Britton is a supply technician in the furniture division of the Senate Office Buildings of the Office of the Architect. This is the second case she has brought against her employer under the Congressional Accountability Act. This case alleges retaliation for bringing the first case and is brought under Section 207 of the CAA, 2 U.S.C. 1317.

Britton commenced proceedings in the prior case, *Britton v. Office of the Architect of the Capitol*, Case No. 01-AC-346 (CV, FM, RP) ("Britton I"), on May 11, 2001. Britton I alleged a violation of Section 202 of the CAA, which applies the Family and Medical Leave Act ("FMLA") to the Legislative Branch. Britton I arose after Britton was disciplined for leaving work without first providing notice or obtaining permission upon learning that her child had committed a violent act at school and was about to be taken into police custody.

On September 20, 2001, while the proceedings in Britton I were pending, Britton notified the AOC that she would need 3.3 hours of leave without pay that day due to a disability. Rather than approving the time off, the AOC placed Britton by incident report in an AWOL disciplinary status for the 3.3 hours requested. On appeal, Britton also asserts the AOC "thereafter proposed a five-day suspension" and "following a hearing on said five-day suspension proposal, issued an Official Reprimand" to Britton. (Brief, p.3.) These facts were not included in Britton's initial Complaint, her proposed Amended Complaint, other pleadings or the record of proceedings before the Hearing Officer.

Considering this action to be retaliatory, Britton filed a timely request for counseling on March 15, 2002. After

completing counseling and mediation, Britton filed a two-count Complaint with the Office of Compliance on February 19, 2003. Both counts of the Complaint are brought under the retaliation provisions in Section 207 of the CAA. Britton's Complaint alleges that her request for counseling also asserted an Americans with Disabilities Act ("ADA") violation under Section 201(a)(3) of the CAA, but her Complaint and Amended Complaint rely exclusively on Section 207.

Count I of the Complaint asserts that the AOC's action violated an agreement the parties entered into on March 8, 1996. The agreement is not part of the record, but Britton alleges that it permits her to "take liberal leave without pay and without adverse action as needed with respect to her disability." Count I also alleges that the AOC's breach of the accommodation agreement and designation of the 3.3 hours as AWOL was retaliation for her previous requests for accommodation under the CAA's ADA/Rehabilitation Act provisions and its FMLA provisions, and retaliation for the proceedings she initiated in Britton I.

Count II of the Complaint alleges that the AOC retaliated against Britton by creating a "supervisory hostile work environment." The factual allegations in Count II are much the same as those in Count I, except that Count II adds the allegation that a "pattern of decisions" by Britton's supervisors resulted in her placement in AWOL status for 3.3 hours on September 20, 2001, and "culminated [in] the creation of an abusive and pervasive hostile work environment which deprived Britton of her statutory entitlements" under the CAA.

On March 6, 2003, the AOC filed a Motion to Dismiss the Complaint with prejudice. The AOC asserted that both Counts I and II of the Complaint failed to articulate a *prima facie* case of retaliation under Section 207 of the CAA. The AOC asserted that Count I should be dismissed because being placed on 3.3 hours of AWOL status was not an "adverse action" as that term has been described by certain courts in Title VII retaliation cases, and Count II should be dismissed because Britton failed to "articulate or describe any specific conduct or environment" to support her hostile environment claim.

On March 19, 2003, Britton filed a Motion for Leave to File an Amended Complaint. A proposed Amended Complaint was submitted with the motion. On March 21, 2003, Britton also filed a response to the AOC's Motion to Dismiss.

On March 25, 2003, after oral argument on the motions, the hearing officer dismissed the initial Complaint and denied Britton's Motion to Amend. The hearing officer determined that the retaliation claim in Count I should be dismissed because the 3.3 hours AWOL was not an "adverse action" as that term has been defined in Title VII-type retaliation cases. The hearing officer dismissed the hostile environment retaliation claim in Count II on the basis that the conduct alleged did not rise to the level of conduct required under the law developed under Title VII. The hearing officer denied Britton's Motion to Amend as being futile. Leave to file a further amended complaint was not requested, and the hearing officer's decision became the final order.

On appeal, Britton raises two issues: (1) whether the hearing officer erred in determining that the AOC's

classification of the 3.3 hours as being AWOL and its issuance of an incident report that subjected her to progressive discipline were not "legally cognizable" under Section 207; and (2) whether the hearing officer erred in denying her Motion to Amend.

The Board published a request for *amici* briefs regarding certain issues presented on appeal, and received several briefs from representatives of employees and employing offices, and other interested parties.

II. Analysis

A. Standard of Review.

The Board's standard of review for appeals from a hearing officer decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406). This appeal implicates the first standard of review above, as the appeal challenges the hearing officer's conclusions that: (1) Britton's retaliation claim was not legally cognizable, and (2) her request to amend should be denied as being futile. The Board's review of the legal conclusions that led to these determinations is *de novo. Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

B. The Framework for Analyzing Section 207 Retaliation Claims.

The Board generally applies the law as developed by the courts under the various laws made applicable to the

Legislative Branch by the CAA. This is consistent with the language of the CAA itself, Section 225(f)(1), 2 U.S.C. § 1361(f)(1), and with the legislative history of the CAA, which establishes that the CAA was designed to make existing employment and labor laws applicable to the Legislative Branch.

This approach cannot be applied so easily to Section 207 of the Act. In drafting the CAA, Congress chose not to incorporate each of the retaliation provisions that exist in the labor and employment laws made applicable by the Act. Instead, Congress adopted Section 207(a), which provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has *opposed any practice made unlawful by this Chapter*, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in *a hearing or other proceeding under this Chapter*.[1] (Emphasis added.)

Section 207(a) unambiguously extends its protections to retaliation claims based on activities protected by the Title VII provisions in Section 201 of the CAA, 2 U.S.C. § 1311; retaliation claims based on the Occupational Safety and Health Act (the "OSH Act") provisions in the CAA, 2 U.S.C. § 1341; retaliation claims based on the labor-management relations provisions in the Act, 2 U.S.C. § 1351; as well as

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[1] The reference to "this Chapter" in Section 207 originally read "this Act", meaning the Congressional Accountability Act of 1995, in Public Law 104-1, Jan. 23, 1995, 109 stat. 3, which enacted the CAA. Accordingly, the "Chapter" referred to is the CAA.

retaliation claims based on any of the other statutory provisions made applicable to the Legislative Branch by the CAA.

The legislative history of the CAA unequivocally supports this conclusion. While the CAA was unaccompanied by any committee reports, two major Senate proponents of the CAA, Senators Charles Grassley and Joseph Lieberman, introduced into the Congressional Record their section-by-section analysis of the CAA. Addressing section 207, the document states, in pertinent part, "This section provides one uniform remedy for intimidation or reprisal taken against covered employees for exercising rights and pursuing remedies of violations for the violation of rights conferred by this act." *Congressional Record*, p. S624, January 9, 1995.

That Congress adopted "one uniform remedy" for retaliation under the CAA is significant because the courts and administrative agencies responsible for applying the underlying labor and employment laws in the Executive branch and the private sector have developed several different frameworks for analyzing retaliation claims under those laws. These include the frameworks developed in cases construing Title VII and other discrimination statutes, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989);[2] the framework developed in cases construing retaliation claims brought under the unfair

[2] Britton did not allege or argue a mixed-motive theory. Therefore, we need not reach the issue of the impact, if any, of the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539, U.S. 90, 123 S.Ct. 2148, 156 L.Ed. 2d 84 (2003), on mixed-motive retaliation cases.

labor practice provisions of the federal labor-management relations laws, see, *Letterkenny Army Depot and International Brotherhood of Police Officers, Local 358*, 35 FLRA 113, 118-22 (1990); the framework developed by the Secretary of Labor for review of retaliation claims brought under the OSH Act, see, 29 CFR § 1977.6(b), and the framework developed by Congress in enacting USERRA, see, 38 U.S.C. § 4311(c).

Because Section 207 creates one uniform remedy for retaliation for opposing "any practice" made unlawful by the CAA, two questions arise. First, we must determine whether one analytical framework should apply to all claims brought under Section 207 or an *ad hoc* approach should apply. Second, if one approach is adopted for all Section 207 cases, we must determine which of the various approaches should apply.

Adoption of Unified Approach for Section 207 Claims.

An *ad hoc* approach to Section 207 claims would result in the application of the analytical framework used in retaliation cases with respect tc the underlying statute protecting the employee's activity. For example, Title VII approaches would apply to claims alleging retaliation for opposing race discrimination, whereas the FLRA's *Letterkenny* approach would apply to claims alleging retaliation for protected union activities and the Secretary of Labor's approach in 29 CFR § 1977.6(b) would apply to claims alleging retaliation for opposing health and safety violations, etc.

The Board is aware of several reported decisions that address the nature of retaliation claims brought under Section 207 of the CAA. Each of these cases applied the

McDonnell Douglas framework used in Title VII and ADA cases, presumably because the underlying claim alleged retaliation for Title VII or ADA activities. See, e.g., *Heamstead v. Office of the Architect*, 38 Fed. Appx. 12, 13, 2002 WL 1359629[3] (D.C. Cir. April 22, 2002) (alleged retaliation for protected Title VII activities); *Timmons v. U.S. Capitol Police Board*, 2005 WL 599978, p. 3 (D.D.C. Mar. 14, 2005) (alleged retaliation for protected ADA/Rehabilitation Act activities); *Brady v. Livingood*, 360 F.Supp.2d 94, 100-101 (D.D.C., 2004) (alleged retaliation for "prior efforts to assert civil rights and oppose discrimination"); *Dean v. Hantman*, 2001 WL 1940434, p.6 (D.D.C. August 8, 2001) (alleged retaliation for protected ADA/Rehabilitation Act activities); *Trawick v. Hantman*, 151 F.Supp.2d 54, 62 (D.D.C. 2001) (alleged retaliation for protected ADA/ Rehabilitation Act activities). None of these cases discusses whether Section 207 requires an *ad hoc* or unified approach.

As we are without binding precedent on the issue posed, the starting point for our analysis of the issue must be the statutory text. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). Based on the statutory text, we conclude that one analytical framework should apply to all claims brought under Section 207, regardless of the nature of the underlying protected activity. Adopting an *ad hoc* approach by which the analytical framework would be determined by the nature of the underlying protected activity would result in an employee who is retaliated against because of race, sex,

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[3] Although *Heamstead* was not selected for publication, D.C. Circuit Rule 28(c)(1)(B) permits citation as precedent of unpublished decisions issued after January 1, 2002.

age, etc. discrimination, being treated differently than an employee who claims retaliation as a result of bringing an unfair labor practice charge or making a complaint that her working environment is unsafe. Such a distinction is directly contrary to the language of Section 207, which creates one integrated provision for retaliation for opposing any practice made unlawful by the CAA.

Section 225(f)(1) of the CAA does not require a different result. It provides:

> Except where inconsistent with definitions and exemptions provided in this chapter, the definitions and exemptions in the laws made applicable by this chapter shall apply under this chapter.

2 U.S.C. § 1361(f)(1). We find that the use of the varying frameworks developed under the laws made applicable by the CAA would be inconsistent with the unified approach provided in Section 207 of the Act.[4]

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[4] Our decision is limited to claims brought under Section 207, and does not address the application of Section 225(f)(1) where existing laws have been made applicable by the CAA. For example, the Board has previously applied a *Letterkenny* framework to unfair labor practice charges brought under the provisions of the federal labor-management law made applicable by Section 220 of the Act, 2 U.S.C. § 1351, and has applied a similar analysis to an interference claim brought under the FMLA provisions made applicable by Section 202 of the Act, 2 U.S.C. § 1312. See, *U.S. Capitol Police Board v. FOP, U.S. Capitol Police Labor Committee*, Case No. LMR-CA-0037 (2002); and *Britton v. Office of the Architect of the Capitol*, Case No. 01-AC-346 (2004). We are not overruling those decisions, and will continue to apply precedent developed under the laws made applicable by the CAA to claims made under the CAA provisions incorporating those laws.

Adoption of Title VII-based approach for analyzing Section 207 claims.

The question therefore becomes whether either Section 207 itself or the CAA as a whole suggests any particular approach. We note that in at least one important aspect, Section 207 more closely resembles the statutory construct of Title VII (and other laws to which Title VII-based approaches have been applied) than the federal labor-management relations laws (and other laws to which "but for" approaches have been applied). Like Title VII, the Age Discrimination in Employment Act ("ADEA"), and the ADA, Section 207 allows covered employees to assert retaliation claims directly. The federal labor-management relations law provides for the prosecution of retaliation claims by the FLRA's general counsel and the OSH Act provides for the prosecution of retaliation claims by the Secretary of Labor, thereby affording the regulatory agency discretion in determining whether there is sufficient evidence of retaliation before a claim may proceed to hearing. See, 5 U.S.C. 7118(a)(1) and 29 U.S.C. § 660(c)(2). Given this difference, there is good cause for adopting an approach that will provide the Office of Compliance's hearing officers with a framework and extensive precedent for assessing the sufficiency of an employee's *prima facie* case, such as will be provided by adopting a Title VII-based approach.

We also note that only one of the laws made applicable by the CAA has a statutorily-mandated analytical framework, i.e., the "but for" methodology set forth in 38 U.S.C. § 4311(c) of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Significantly, Congress chose not to make this "but for" framework applicable to the Legislative Branch, in that it did not

incorporate 38 U.S.C. § 4311(c) in Section 206(a) of the CAA. 2 U.S.C. § 1316(a)(1)(A). We consider it inappropriate to adopt a *Letterkenny* or similar "but for" framework for Section 207 retaliation claims when Congress clearly elected not to adopt such a framework for USERRA-based retaliation claims. We therefore conclude that Title VII-based frameworks should be applied when analyzing retaliation claims brought under Section 207.

C. The "Adverse Action" Requirement.

The hearing officer applied a Title VII approach and dismissed Britton's retaliation claim for failure to allege employer conduct rising to the level of a "material adverse action" as defined by the D.C. Circuit in *Heamstead v. Office of the Architect*, 2002 WL 1359629 (D.C. Cir. 2002). On appeal, Britton argues that a broader definition of "adverse action" should apply to retaliation claims brought under Section 207.

Much of the litigation in Title VII-type retaliation cases involves the question of whether the employer's conduct rises to the level of an adverse action. Currently, there is a split among the Circuit Courts of Appeal as to how the adverse action requirement should be defined.

The Fifth and Eighth Circuits limit the type of employer conduct that is prohibited to "ultimate employment decisions" whereby only incidences of hiring, granting leave, discharge, denial of promotion, or decrease in compensation will support a cause of action for retaliation. *Mattern v. Eastman Kodak Co.*, 104 F3d 702 (5th Cir. 1997); *Ledergerber v. Sanger*, 122 F. 3d 1142, 1144 (8th Cir. 1997) (transfer involving only minor changes in working conditions and no reduction in pay or benefits is not an

adverse employment action); but see, *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (defining ultimate employment decision to include a "tangible change in duties or working conditions that constituted a material employment disadvantage").

The D.C., Second, Third and Sixth Circuits have adopted a middle-ground position, by which the employee must show that the employer retaliated by making "a materially adverse change in the terms of [her] employment". *Brown v. Body*, 199 F.3d 446, 457 (D.C. Cir. 1999); *White v. Burlington Northern & Santa Fe Railway*, 364 F.3d 789 (6th Cir. 2004); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir.1997) ("retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment" to constitute an adverse employment action); *Torres v. Piano*, 116 F.3d 625, 640 (2nd Cir.1997).

Other Circuits have adopted broader standards, by which many other types of employer conduct are considered sufficiently adverse to support a claim for retaliation. For example, the Ninth Circuit's standard is based on the EEC's interpretation[5] of adverse employment action, which is defined as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity". *Ray v. Henderson*, 217 F.3d 1234, 1240-3 (9th Cir. 2000) (discussing split among the Circuits and citing EEC

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[5] Although EEOC Guidelines are not binding on the courts (or on this Board), they "constitute a body of experience and informed judgement to which the courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

Compliance Manual § 8, "Retaliation," ¶ 8008 (1998).) See also, *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir.1994) (adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996) (employer can be liable for retaliation if it permits "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services ... or cutting off challenging assignments"); *Corneveaux v. CUNA Mutual Ins. Group*, 76 F.3d 1498, 1507 (10th Cir.1996) (employee demonstrated adverse employment action under the ADEA by showing that her employer "required her to go through several hoops in order to obtain her severance benefits"); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir.1998) (adverse employment actions include an employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment).

In determining whether a narrow or broader definition of prohibited employer conduct should apply in Section 207 cases, the starting point for our analysis is once again the statutory text. *Desert Palace*, 123 S. Ct. at 2153.

Section 207 provides that it shall be unlawful for an employing office to "intimidate, take reprisal against, or otherwise discriminate against" a covered employee because he or she has opposed any practice made unlawful by the CAA. By the reference to "intimidation", the employer

conduct prohibited by Section 207 is broader than the retaliation provisions in Title VII, 42 U.S.C. § 2000e-3, the retaliation provisions in the ADEA, 29 U.S.C. 623(d), and the retaliation provisions in the ADA, 42 U.S.C. 12203(a). These statutory provisions do not refer to intimidation, and only prohibit "discrimination" because an employee has engaged in certain protected activities.

Section 207 is also broader than the retaliation provisions in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 215(a)(3), which makes it unlawful for an employer to "discharge or in any other manner discriminate" against any employee who has engaged in protected activities; the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. °2002(4), which makes it unlawful to "discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action"; USERRA, 38 U.S.C. § 4311(b), which provides that an employer may not "discriminate in employment against or take any adverse employment action against any person because such person has engaged in protected activities"; and the OSH Act, 29 U.S.C. § 660(c), which provides that "no person shall discharge or in any manner discriminate" against an employee because the employee has engaged in protected activities.

We believe that Congress' use of the term "intimidate" in addition to reprisal and discriminate in Section 207 evidences the intent to more broadly define the type of employer conduct proscribed. We note that the interference provisions in Section 503(b) of the ADA contain a reference to "intimidation" as well as references to coercion, threats and interference. 42 U.S.C. 12203(b). Such interference clauses have generally been construed more broadly than the adverse action cases under Title VII

might suggest. See *Brown v. City of Tucson*, 336 F.3d 1181, 1191-92 (9th Cir. 2003).

We therefore decline to adopt a narrow definition of adverse action for Section 207 retaliation cases, and instead adopt the EEOC's definition of adverse action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity".

Our adoption of a more flexible definition of adverse action should not be understood as invitation to transform the CAA into a "civility code". The essence of Section 207 is the prevention of employer conduct that chills legitimate opposition to unlawful practices. An adverse action will not be established merely because the employee dislikes the employing office's action or disagrees with it. While our "reasonably likely to deter" test may be more flexible than the "ultimate employment action" and "material adverse action" requirement used by some courts in the Title VII context, it is intended to exclude petty slights, trivial annoyances and anything that is not reasonably likely to deter employees from engaging in protected activity.

D. Application of the Analytical Framework to this Case.

The hearing officer determined that the retaliation claim in Count I of Britton's Complaint should be dismissed because the 3.3 hours AWOL was not an adverse action.

Applying a "reasonably likely to deter" definition as described above, we find that Britton's allegations were

sufficient to survive a motion to dismiss at the pleading stage. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), instructs that the standards for pleading employment claims are no higher than the relaxed notice pleading standard of Federal Rule of Civil Procedure 8(a): all that is required is that the complaining party allege a "short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz applies with equal force to discrimination and retaliation claims. *Walker v. Thompson*, 288 F.3d 1005, 1011 (7th Cir.2002) (applying *Swierkiewicz* to prisoner retaliation claim); *Castillo v. Norton*, 219 F.R.D. 155, 160-62 (D.Ariz.2003).

Britton alleged that, rather than approving her time off without pay, the AOC placed her in AWOL disciplinary status because she had initiated the proceedings in Britton I. The fact that the time off requested would be without pay whether characterized as approved or unapproved AWOL is not dispositive, as the AOC's action was in the nature of discipline itself and could (and perhaps did) subject Britton to further disciplinary action. We therefore remand Britton's retaliation claim for further proceedings consistent with this decision.

E. The request to amend.

Britton's proposed Amended Complaint included three counts. Count I alleged a retaliatory "breach and nullification" of the 1996 accommodation agreement. Count II alleged that the decision to classify the 3.3 hours as AWOL rather than unpaid leave and issue an incident report was retaliatory. Count III reasserted the hostile environment claim that had been made in Count II of the

initial Complaint. The proposed Amended Complaint also would have added a series of factual allegations regarding: (1) events that led to entry into the accommodation agreement in 1996; (2) events in 1999 and 2000 that led to the filing of the FMLA claim in *Britton I* on May 11, 2001; and (3) events in September 2001 that led to the filing of the instant complaint in February 2002. (Amended Complaint, pars. 6-30.)

Britton's Brief on appeal does not assert any basis for reversing the Hearing Officer's decision to dismiss the hostile environment retaliation claim as set forth in Count II of her initial Complaint, or the Hearing Officer's decision to deny amendment of that claim as set forth in Count III of her proposed Amended Complaint. Similarly, Britton's Brief on appeal does not assert any basis for reversing the Hearing Officer's decision to deny amendment to add a breach of contract claim as set forth in Count I of her proposed Amended Complaint. We therefore affirm the Hearing Officer's decisions dismissing Count II of the initial Complaint and denying leave to amend to add the claims as set forth in Counts I and III of her proposed Amended Complaint, because she has failed to preserve or present her claims adequately in her appeal. See, Rule 8.01 of our Procedural Rules.

This leaves us with Britton's request to amend her retaliation claim as set forth in Count II of the proposed Amended Complaint. The proposed Count II added a series of facts occurring before the 180-day period[6] preceding the request for counseling in this case. However, the

[6] The request for counseling was filed on March 15, 2002, such that the 180-day period preceding the filing began on September 15, 2001.

gist of the claim in the proposed Count II is that the AOC retaliated against Britton by characterizing the September 20, 2001 leave as AWOL. To the extent that Count II alleges facts occurring before the 180-day period, it does so simply to support Britton's claim that she had engaged in activities protected the Act.

For the reasons discussed above, we reverse the Hearing Officer's determination that the request to amend the retaliation claim should be dismissed as being futile. The AOC also asserts that amendment was properly denied under Rule 5.01(d) of the Office's Procedural Rules, which states:

> Amendments to the Complaint may be permitted by the office or, after assignment by a Hearing Officer, on the following conditions: that all parties to the proceeding have adequate notice to prepare to meet the new allegations; that the amendments, as appropriate, relate to the violations for which the employee has completed counseling and mediation,; and that permitting such amendments will not unduly prejudice the rights of the employing office, unduly delay the completion of the hearing or otherwise interfere with or impede the proceedings.

We reverse the denial on procedural grounds of the request to amend the retaliation claim as set forth in Count II of the proposed Amended Complaint for the following reasons: (1) the Motion to Amend was filed just 13 days after the AOC filed its Motion to Dismiss on March 6, 2003, (2) Count II of the proposed Amended Complaint did not raise any theories that were significantly new or surprising, (3) the Hearing Officer did not believe the amendment would prejudice the AOC, and (4)

there was more than 30 days (and perhaps more than 60 days) remaining before the hearing had to commence. Under these circumstances, the request to amend the retaliation claim should have been allowed.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board reverses dismissal of the Complainant's retaliation claim and the denial of the Motion to Amend the retaliation claim as set forth in Count II of the proposed Amended Complaint. The Board affirms dismissal of Britton's hostile environment retaliation claim, and affirms dismissal of her Motion to Amend that claim and affirms dismissal of her Motion to amend to add a breach of contract claim.

It is so ordered.

Issued, Washington, D.C. May 23, 2005